NO. 12634

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant*

v.

DOROTHY SHARP, *Appellee*

Appeal from the United States District Court for the Southern District of California, Central Division

BRIEF OF APPELLANT

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Appeal from the United States District Court for the Southern District of California, Central Division

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

The appellant, the plaintiff below, appeals from a final judgment of the United States District Court for the Southern District of California, Central Division, denying a prayer for treble damages, an injunction and restitution for rent overcharges pursuant to Sections 205 and 206(a) and (b) of the Housing and Rent Act of 1947, as amended (50 U.S.C.A. 1881, et seq.) (R. 30). The judgment was entered on May 10, 1950 (R. 30). Notice of Appeal was filed on July 6, 1950 (R. 31). Jurisdiction of this Court is conferred by Section 1291 of the Judicial Code (28 U.S.C.A. 1291).

STATEMENT OF THE CASE

The United States filed suit against the defendant for overcharges of rent at 430 Daisy Avenue and 537 Melrose Way, Long Beach, California (R. 2). The overcharge at 430 Daisy Avenue resulted from the defendant's registration of the premises in 1946 as individual rooms in a rooming house (Plaintiff's Exhibit 9) (R. 89), and then subsequently renting the premises on June 11, 1948 as a single housing accommodation (a furnished apartment) for the first time (R. 56).

In January 1949, the defendant was called into the Area Rent Office and was told that she must file a registration statement covering the premises rented as an entire unit (R. 73). She did file a registration statement (Plaintiff's Exhibit 3, R. 41), and, according to her Answer, because she was "compelled" to do so "by threat and intimidations" (R. 9). The registration statement on its face shows that the rent collected was $75.00 per month for the entire unit as represented in the written lease between the parties (R. 56). On March 23, 1949, the Area Rent Director issued an order reducing the maximum rent on the entire unit to $37.50 per month effective from the date of the lease, June 11, 1948 (Pl. Exh. 4—R. 44).

The violations at 537 Melrose Way occurred because the defendant charged a dollar extra for the use of the bed and $5.00 extra as a cleaning charge (R. 24), without permission of the Expediter.

The case went to trial on February 25, 1950 (Honorable Harry C. Westover, D.J. sitting) (R. 32). The trial developed the facts as set forth above and at its conclusion, the Court below entered Findings of Fact

and Conclusions of Law (R. 24), which included a Memorandum Opinion of the Court (R. 20). Based upon its Findings and Memorandum Opinion, a judgment was entered for the defendant (R. 30).

In its Findings of Fact, the Court below found that the accommodations in question were subject to the Act of 1947 (No. 1, R. 125); that the defendant did not receive rent in excess of the maximum (No. 2, R. 25); that the defendant did not collect more than the legal maximum on either housing accommodation (No. 3 to 5, R. 26); that the premises at 430 Daisy Avenue were registered on August 14, 1946 "as a rooming house, of four individual furnished rooms" (No. 7, R. 27); that the defendant rented the entire premises as a unit on June 11, 1948 for $75.00 per month (No. 8, R. 27); that the said premises "had never been rented or registered" as a unit (No. 9, R. 27); that an order has never been entered altering the registered rent on the individual rooms (No. 10, R. 27); that an order was issued on March 23, 1949 reducing the rent on the premises in question from $75.00 to $37.50 per month (No. 11, R. 27); that the registration filed on January 14, 1949 was "a new registration and not a modification of the previous one" (No. 13, R. 28); that the entire premises rented under the written lease covered the individual units previously registered on August 14, 1946 (No. 15 and 16, R. 28); and that 430 Daisy Avenue was rented as a single unit for the first time on June 11, 1948 (No. 19, R. 29). As a conclusion of law, the Court held that the United States was not entitled to a judgment against the defendant (R. 29).

In its Memorandum Opinion, which was adopted as further Findings of Fact (No. 20, R. 29), the Court below found that the premises "had been rented as individual furnished rooms" (R. 21). After renting the premises as an entire unit, the Expediter maintained that another registration was required (R. 21). The Court then said that notice was not served upon the defendant stating the grounds upon which the Area Rent Office intended to reduce the rent, that the only evidence before the Court was that the Order had been entered "upon the initiative of the Housing Expediter, and no reasons were given to the landlord for the proposed change" (R. 22). The Court further found that the premises in question were "controlled housing accommodations" and had been registered as rooms and the rooming house registration was a valid existing one which the Expediter could have modified (R. 22). The Court then questioned the right of the Expediter to demand a new registration based upon the renting of the premises as an entire unit (R. 22). The Court further found that the defendant had complied with the law by registering the premises originally on August 14, 1946 (R. 23) and then cited Section 203(a) of the Act (*Infra,* p. 10) as authority for the conclusion that the Expediter had no authority to establish a maximum rent pursuant to the Emergency Price Control Act of 1942 (R. 23). The Court then concluded that the Expediter had no authority to require the registration statement and had no authority to issue an order reducing the rent to $37.50 (R. 24).

With regard to the accommodation at 537 Melrose Way, the Court found that although $6.00 had been

collected in excess of the maximum rent, that the tenant had received the *quid pro quo* and, therefore, "there is no overcharge as to Unit 537" (R. 24).

From the judgment denying plaintiff's prayer, the Government appeals (R. 31).

SUMMARY

The Government relies upon three grounds for reversal of the judgment of the Court below:

First, the Court below erred in failing to give full force and effect to the order of the Area Rent Director, because:

a) The Expediter has authority pursuant to the Act of 1947, to establish maximum rents, and,

b) The defendant's failure to exhaust her administrative remedies precludes a challenge to the validity of the order establishing the maximum rent.

Second, the Court below should have entered a judgment for the Government, after having found that excess collections had been made, even though additional services had been rendered, but without application to the Expediter for an increase in rent, or the issuance of an order increasing the legal rent.

Third, the Court below found rents in excess of those established had been collected, but denied recovery on the ground that the Area Rent Director had no authority to establish those rents. Therefore, the findings of the Court are "clearly erroneous" and should be reversed.

ARGUMENT

I.

The Court Below Erred in Failing to Give Full Force and Effect to the Order Issued by the Area Rent Director Reducing the Maximum Rent on the Premises in Question.

As stated above, the basic facts in this case are not in dispute. The defendant registered her housing accommodations at 430 Daisy Ave., Long Beach, on August 14, 1946, "as a rooming house, of four individual furnished rooms" (Finding 7, R. 27; See, Pl's Exh. 9). The aggregate ceiling rent on the premises was "approximately $90.00 per month" (id.) On June 11, 1948, the defendant under written lease rented the entire premises at 430 Daisy Ave., as a complete housing unit (R. 56). Subsequently, (January 14, 1949), the defendant filed a registration statement on the premises, registering it under the housing regulation as a unit (Pl's Ex. 3—R. 41),[1] at a rental of $75.00 per month. The Area Rent Director issued an order on March 23, 1949, reducing the rent to $37.50 per month, effective to the date of the lease, June 11, 1948, and ordering a refund of the excess collected (R. 44). No protest was filed nor appeal taken from the issuance of that order (R. 77). The Court below, however, refused to give effect whatever to this order, on the ground that, "the Office of Housing Expediter had * * * no authority to make the order reducing the rent from $75.00 to $37.50" (R. 24). The Court seemed to base this conclusion on the ground that the Expediter lacked authority to issue an order establishing a maximum rent on

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[1] In her answer she pleads that she was "compelled" to sign this registration, by "threat and intimidations" (R. 9).

any property controlled under the Emergency Price Control Act of 1942, as amended (50 U.S.C.A. 901, et seq.) (R. 23).

The Court below was in error in reaching the conclusion that the order was invalid, because (1) The Expediter does have authority to establish rents pursuant to the Act of 1947; and (2) the order was valid in the Court below inasmuch as the defendant failed to exhaust her administrative remedies. These contentions will be discussed in order.

1. The Expediter has authority to establish maximum rents pursuant to the Act of 1947.

Preliminary to the discussion of the main point, the question of registering housing accommodations must be clarified. The Court below concluded that the registration of the individual rooms in the rooming house, sufficiently covered the rental of housing accommodations as an entire unit (R. 22). That is, that the maximum rent for the entire unit, when rented as such, was the aggregate of the rents on the individual rooms (R. 23). The regulations are to the contrary.

There are two regulations in issue here. The first is the Rent Regulation for Transient Hotels, Residential Hotels, Rooming Houses and Motor Courts (8 F.R. 7334).[2] The second is the Controlled Housing Rent Regulation (12 F.R. 4331; 13 F.R. 1861; 14 F.R. 1571). The former regulation provided that "This regulation

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[2] The defendant registered pursuant to the terms of this regulation. The control of rooming houses was continued under a similar regulation pursuant to the Act of 1947. See, Rent Regulation for Controlled Rooms in Rooming Houses and Other Establishments (12 F.R. 4302; 13 F.R. 1873; 14 F.R. 7334).

applies * * * to all rooms in residential hotels, rooming houses * * *'' (Section 1; see full text, *infra,* p. 29). Further, the regulation provides in Section 1(b):

> ''*Housing to which this regulation does not apply.* This regulation does not apply to the following: * * *
>
> (4) *Entire structures used as hotels, rooming houses or motor courts.* Entire structures or premises used as hotels, rooming houses or motor courts, as distinguished from the rooms within such hotels, rooming houses or motor courts''.

Therefore, by the express terms of the regulation, the only maximum rent established by the original renting, was that on the rooms themselves. Until rented as a unit, *the apartment itself did not have a maximum rent established.*

Conversely, the Housing Regulation exempts from its control all accommodations subject to the Rooming House Regulation (See, Section 1(b)(iii), *infra,* p. 26). It is common for a rooming house to have two registrations. One, covering the house itself; the other, covering the renting of the individual rooms. The two regulations complement one another, thereby securing for the landlords the most equitable results from two distinct types of operation. As was said by the Emergency Court of Appeals in *Bowman* v. *Bowles,* 140 F. 2d 974, at p. 978:

> ''* * * Generally, we find that the Administrator, in exercising his delegated authority over rents, issued the Housing Regulation to provide control for

accommodations rented on monthly or longer terms and issued the Hotel Regulation to provide control over accommodations rented on daily, weekly or monthly terms. * * * However, differences in the types of business covered by the two Regulations required variations in their provisions. One variance is that the Housing Regulation makes no provision for a sliding scale of rents, whereas such provision is included in the Hotel Regulation. The right to seek adjustments has been granted in the Housing Regulation when there is a substantial increase or decrease in the number of occupants, but this is obviously quite different from the provisions of the Hotel Regulation which permit, without need of seeking an adjustment, a maximum rental schedule for daily, weekly and monthly terms and for varying numbers of occupants. Other provisions of the Hotel Regulation, clearly applicable to a business based on short term occupancies, are those requiring that no tenant be required to change his term of occupancy and that landlords continue to offer for rent on a weekly or monthly term of occupancy the same number of rooms so rented in June, 1942. * * *''

The Court below erred, therefore, in failing to recognize that these two distinct operations made it imperative to have two registrations on this property, in order to establish two separate, legal rents. And the renting of the apartment as such was subject to a maximum rent totally distinct from the maximum rents established on the individual rooms comprising it.

We come then, to the question of whether the Expediter has authority to establish rents under authority of the Act of 1947. The Court below found that "The requirement of the Rent Control Act to register was originally met by the defendant because, on August 14, 1946, she had filed a registration * * * and had the ceiling established on the rooms in the house" (R. 23). The Court then cited Section 203(a) of the Act,[3] and concluded it was unnecessary to register the rooms when rented as an apartment (R. 23). This action of the Court must be interpreted to mean that the rent having been established under the Act of 1942, no other action could have been taken to establish a rental on the entire unit under the later Act.

If the Court meant that the expediter may not establish maximum rents under the Act of 1947, the legislative history fails to support the contention.

> "Administration of present rent controls under authority of the Emergency Price Control Act of 1942, as amended, would terminate after the effective date of this title, which is the first day of the first calendar month following the month in which the bill is enacted into law. Thereafter, rent controls would be exercised under the provisions of this title and administered by the head of such established department or agency of the Government

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[3] That Section of the 1947 Act provides:

> "Sec. 203(a) After the effective date of this title, no maximum rents shall be established or maintained under the authority of the Emergency Price Control Act of 1942, as amended, with respect to any housing accommodations."

as the President designates, * * *." (H. Rep. 317, 80th Cong. 1st Sess.—p. 12)

Furthermore, the language of the Act gives the Expediter authority "to issue such regulations and orders, * * *, as he may deem necessary to carry out the provisions [of Section 204]",[4] (Section 204(d), *infra,* p. 25) which is the Section of the Act providing for the control of rents.[5]

If the Court below intended to hold that rents once established under the Act of 1942, may not have rents set under the Act of 1947, the language of the Act fails to support it. The premises here were first rented in 1948 as an entire unit. Of necessity, therefore, the rent had to be established under the existing Act and the regulations issued pursuant thereto. Even if a rent had been established pursuant to the Act of 1942, nothing in the present Act prevented the Expediter from acting under the present law.

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[4] Section 204(a) reads in full:

"Sec. 204. (a) The Housing Expediter shall administer the powers, functions, and duties under this title; and for the purpose of exercising such powers, functions, and duties, and the powers, functions, and duties granted to or imposed upon the Housing Expediter by title I of this Act, the Office of Housing Expediter is hereby extended until the close of June 30, 1951."

[5] Section 825.4(a) of the regulation provides:

"The maximum rent for any housing accommodation under 825.1 to 825.12 inclusive, (unless and until changed by the Expediter as provided in 825.5), shall be the maximum rent which was in effect on June 30, 1947, as established under the Emergency Price Control Act of 1942, as amended * * *." See Section 206(a) of the Act, *infra,* p. 17.

Section 4(c) of the present Regulation (issued pursuant to Section 204(d)) (*infra,* p. 25) controls the present situation. "For controlled housing accommodations first rented on or after July 1, 1947, the maximum rent shall be the first rent for such accommodations." The premises, however, must be registered within thirty days, and the Expediter may decrease that rent by order, on the ground that rent is higher than generally prevailing, or that the first rent was made at an abnormally high seasonal period.[6] Since this regulation is not an irrational administrative construction of Section 204(d) it is binding on the courts. *Porter* v. *Crawford & Doherty,* 154 F. 2d 431, 433 (C.A. 9th).

Thus, the Expediter both under the Act and by the provisions of his regulation had the authority to establish a legal maximum rent on the premises in question, when rented as a furnished apartment.

2. The order was valid in the Court below since the defendant never exhausted her administrative remedies.

The Court below incorrectly held that the order issued reducing defendant's rent was invalid, because "no notice was served upon the defendant stating the proposed action or the grounds therefor" (R. 21).[7] In

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[6] The Text of Sections 4(e), 5(c)(1) and (6) appear, *infra,* pp. 27-28.

[7] The Court here cited 840.7 of the Regulation which provides in pertinent part:

> " 'In any case where the Rent Area Director . . . . deems it necessary or appropriate to enter an order on his own initiative he shall, before taking such action, serve a notice on the landlord of the housing accommodations involved, stating the proposed action and the grounds therefor.' "

so ruling the Court below erred because this conclusion is not only unfounded, but it is directly contrary to the evidence. Plaintiff's Exhibit No. 4 (See, *infra,* p. 31) clearly shows on its face that the defendant was not only notified prior to the issuance of the order of March 23, 1949, but that she objected to its issuance in writing on "3/9/49".

In any event, the validity of the order issued could not be raised by way of defense, in the absence of an exhaustion of administrative remedies. There is no question here that defendant failed to exhaust her remedies, in the light of her testimony that she was compelled by the regulation to deposit the amount of the refund, before her appeal could be filed and she "didn't have the money to deposit" [8] (R. 77).

In deciding that the order in issue was invalid even though the defendant had not exhausted her administrative remedies, the Court below nullified "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Corp.,* 303 U. S. 41, 51. It is axiomatic that the foregoing rule applies where the one injured is the moving party in equity. *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752; *McCauley* v. *Waterman S. S. Corp.,* 327 U. S. 540; *Bab-*

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[8] The refund amounted to $300.00.

Section 840.16 of Procedural Regulation No. 1 (13 F.R. 2369) provided that the refund provisions of an order shall be stayed pending appeal, if "a certified check or a money order in the amount of the refund * * *" accompanies an appeal within 30 days of the issuance of the order (*Infra,* p. 28). See, *Babcock* v. *Koepke,* 175 F. 2d 923 (C.A. 9th).

cock v. *Koepke,* 175 F. 2d 923 (C. A. 9th); *Anderson* v. *Schwellenbach,* 70 F. Supp. 14 (N. D. Cal.), 3-Judge Court.

The rule applies with equal force where the party against whom the enforcement action is filed attacks the validity of the order by way of defense.

This Court has consistently applied that rule. In *United States* v. *La Verne Co-op Citrus Assn.,* 143 F. 2d 415 (C. A. 9th), the Government sought an injunction restraining defendants from handling lemons in violation of an order of the Secretary of Agriculture. The District Court refused to permit evidence on the question of the constitutionality of the order, on the ground that the Act[9] provided for an administrative remedy, which had not been exhausted by the defendants. The injunction issued and the defendants appealed. In affirming that judgment, this Court held that an administrative remedy must be pursued to completion before invoking equity jurisdiction, whether the party affected is plaintiff or defendant.

> "The question then arises whether the administrative remedy rule applies where the one harmed by the administrative order is the defending party in the equity action. The doctrines of primary jurisdiction and of administrative finality are equally persuasive where the issue is raised by defending parties as where it is raised by moving parties. A consideration of the defense in an enforcement action would nullify the uniformity

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[9] Agricultural Marketing Agreement Act of 1937 (7 U.S.C.A. 601 *et seq.*)

> achieved by devising a single procedure for testing orders promulgated in accordance with the terms of the Act. * * *'' (at p. 420)

This decision was made in the light of the Supreme Court's ruling in *Yakus* v. *United States,* 321 U. S. 414. There the Court answered the sole question ''whether the validity of a regulation may be challenged in defense of a prosecution for its violation although it had not been tested by the prescribed administrative procedure * * *'' (id. p. 419). In holding that the validity of an order may not be challenged, even in a criminal prosecution, where the record shows that the administrative process has not been used, the Court said, at p. 434:

> ''* * * petitioners have failed to seek the administrative remedy and the statutory review which were open to them and that they have not shown that had they done so any of the consequences which they apprehend would have ensued to any extent whatever, or if they should, that the statute withholds judicial remedies adequate to protect petitioners' rights.''

See too, *Woods* v. *Durr,* 176 F. 2d 273 (C. A. 3rd).

So, here, where the record is conclusive that the defendant has failed to follow the administrative procedure, she may not now resort to the Court for relief. To do so would nullify ''the long settled rule'' of exhaustion of administrative remedies and permit courts to exercise jurisdiction which established principles

now deny them[10] at the threshold of the proceedings.

Thus, the Court below erred on two grounds in finding that the order was invalid because of a denial of procedural due process; (1) The order on its face shows that a written objection to its issuance was received and considered, two weeks prior to issuance; and (2) she failed to appeal the order and thus, exhaust her administrative remedies, which are conditions precedent to judicial review either by bill in equity or by way of defense.

II.

The Court Below Erred in Failing to Enter a Judgment Against the Defendant on the Premises at 537 Melrose Way, After Finding That the Overcharge Had Been Collected.

The Court below found as a fact that the premises at 537 Melrose Way were controlled housing accommodations, and as such were subject to the Act and the regulations (No. I, R. 25). In its oral opinion (adopted as a Finding of Fact, No. XX—R. 29), the Court found the overcharge had been collected, but the receipt showed additional services had been rendered, and, "There is nothing in the case to indicate that the tenant was entitled to an additional bed without paying therefor nor was entitled to the cleaning of her apartment free of charge; consequently the Court is of the opinion that there is no overcharge as to Unit 537" (R. 24). Under this decision a landlord may collect more than the legal maximum "in connection with the use and occupancy of any housing accommodation", and, if the

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[10] There is, of course, no question here of denial of due process, since the defendant failed to take the initial steps invoking it.

quid pro quo is furnished, no overcharge results. Such a conclusion could successfully nullify effective rent control.

The Act, the regulation and the reported decisions are contrary to this holding of the Court below. Section 206(a) of the Act[11] forbids the collection of rent in excess of the maximum established by it, or any regulation,[12] or order, of the Expediter. In addition, the regulation specifically authorizes a landlord to obtain rent increases in an orderly, legal manner with the prior approval of the Expediter. Concomitantly, it provides an effective measure of protection to the tenant from unjustified and unnecessarily burdensome in-

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[11] That Section reads as follows:

"Sec. 206. (a) It shall be unlawful for any person to demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204, or otherwise to do or omit to do any act, in violation of this Act, or of any regulation or order or requirement under this Act, or to offer, solicit, attempt, or agree to do any of the foregoing."

[12] Section 2(a) of the Regulation provides:

"(a) *General prohibition.* Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall offer, demand or receive any rent for or in connection with the use or occupancy on and after the effective date of §§ 825.1 to 825.12, inclusive, of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by §§ 825.1 to 825.12, inclusive; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. A reduction in the services, furniture, furnishings, or equipment required under § 825.3 shall constitute an acceptance of rent higher than the maximum rent. Lower rents than those provided by §§825.1 to 825.12, inclusive, may be demanded or received."

creases.[13] The wisdom of this provision has been recognized and applied by several Courts of Appeal.

In *Creedon* v. *Olinger,* 170 F. 2d 895 (C. A. 5th), the District Court denied recovery for overcharges "for the reason that refrigerators had been furnished by some of the tenants, air-conditioning had been made possible by the defendant to others, and at times during the period in question relatives and friends had visited certain of the tenants and during the visit occupied apartments with them" (id. p. 897). The District Court held that:

> " 'It is the business of the courts to try to discover the just way and from an impartial attitude to see where the right is.' " (id.)

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[13] Section 5(a)(3) of the Regulation says:

"(a) *Grounds for increase of maximum rent.* Any landlord may file a petition for adjustment to increase the maximum rent otherwise allowable only on the grounds that: * * *

(3) *Substantial increase in space, services, furniture, furnishings or equipment.* There has been a substantial increase in the services, furniture, furnishings, or equipment provided with the housing accommodations since the date or order determining its maximum rent or a substantial increase in the living space since June 30, 1947 but before April 1, 1948. No increase in the maximum rent shall be ordered on the ground set forth in this paragraph (a)(3) unless the increase in living space, services, furniture, furnishings or equipment occurred with the consent of the tenant or while the accommodations were vacant: *Provided,* That an adjustment may be ordered, although the tenant refuses to consent to the increase in living space, services, furniture, furnishings or equipment, if the Expediter finds that such increase (i) is reasonably required for the operation of a multiple dwelling structure or other structure of which the accommodations are a part or (ii) is necessary for the preservation or maintenance of the accommodations."

In reversing that decision the Court of Appeals held that the landlord's relief was in the administrative procedure provided, and not in the courts. The Court then concluded:

> "Since the undisputed evidence clearly discloses overcharges during the period alleged in the complaint, judgment for at least the amount of the overcharges must be granted in favor of the Expediter or, by way of restitution, to the tenant." (id.)

A more exaggerated case came before the Court of Appeals for the First Circuit in *Elma Realty Co.* v. *Woods,* 169 F. 2d 172. There the appellant's building was burned in part, rendering it unfit for human habitation. The Area Rent Director reduced the rent to $1.00 per week "due to substantial deterioration", but informed the appellant that it would increase the rent when made habitable again. On June 6, 1947, after rehabilitation of the premises, the rents were adjusted upward. However, the appellant had been collecting increased rent from the previous April without authorization. This collection constituted the overcharge. In upholding the trial court's judgment of restitution and double damages, the Court said, at p. 174:

> "* * * Thus although the appellant was undoubtedly entitled to an upward adjustment of its maximum rents after its apartments were again habitable, nevertheless the regulations do not permit it to increase its rents until after it has ap-

plied for and obtained permission to do so. Thierry v. Gilbert, 1 Cir., 147 F. 2d 603."

In *Woods* v. *Polis,* 180 F. 2d 4 (C. A. 3rd), the landlord raised the rent from $50 to $65 per month, but claimed "he waived some $400 worth of repairs and obligations, the cost of which should have been borne by the lessees but which in fact were not" (id. p. 6). The District Court entered a judgment for treble damages and injunctive relief. The Court of Appeals affirmed the judgment, saying the landlord should have petitioned the Expediter for an adjustment of rent:

> "However, even if there was a shifting in the obligations between the first and second arrangements by this landlord with his tenant, it is not disputed that there was no application made for a change in rent. The rent regulations permit the landlord to petition for an adjustment when there has been a substantial increase in services. That administrative procedure was open to the landlord here, but he chose instead to make his own determination of the worth of the services which were to be performed by the lessees under the freeze date lease. Such a determination is not binding upon the Housing Expediter. See *Elma Realty Co.* v. *Woods,* infra. The freeze date registration of the premises remained in full force, and it permitted a maximum rental of $50 per month. It was unlawful for the landlord to receive more than $50 per month in cash until he had successfully petitioned for an adjustment; any cash payment in excess of that amount was an overcharge which

could be recovered by the Expediter." (id. pp. 6-7)

See, too, *Woods* v. *Dodge,* 170 F. 2d 761 (C. A. 1st); *McCormack* v. *Kovacevich,* 170 F. 2d 588 (C. A. 7th); *Kalwar* v. *McKinnon,* 152 F. 2d 263 (C. A. 1st); *Woods* v. *Kimmey,* 88 F. Supp. 838 (W. D. Pa.).

The decision of the Court below that although an additional charge was made, the tenant received additional services, is contrary to these well reasoned authorities. It is respectfully requested that this Court bring the decision of the Court below into accord with this overwhelming weight of authority.

III.

The Finding of the Court Below That the Plaintiff Failed to Establish the Overcharge Is Contrary to the Evidence and Is Clearly Erroneous.

In finding that the defendant did not overcharge (Findings III and IV, R. 26), the Court below disregarded the admissions of the defendant and the conclusive proof in the record. The attack on these findings, therefore, is not contrary to the provisions of Rule 52(a) of the Federal Rules of Civil Procedure (28 U. S. C. A. foll. 723(c)),[14] since these findings are not supported by any evidence whatever in the record. They are, therefore, "clearly erroneous." *Lerner Stores Corp.* v. *Lerner,* 162 F. 2d 160, 162 (C. A. 9). More-

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[14] Rule 52(a) provides in part as follows:

"* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

over, the record is conclusive that the Expediter proved both the maximum rent and the collection of rent in excess of the maximum.

1. As to the overcharge at 537 Melrose Way, the plaintiff introduced the order of the Area Rent Director, establishing the rent at $29.00 per month (Plaintiff's Exhibit 2, R. 37). That Exhibit is uncontradicted in the record.[15] The tenant of that accommodation testified that she paid $30.00 for one month and $35.00 for the second month and that these amounts included extra charges for a bed and cleaning charge, respectively (R. 64). The receipts introduced into evidence (Plaintiff's Exhibit 8, R. 65), show on their face that these charges were collected for the additional services (R. 24). There is no contradiction in the record that these amounts were not received. There is merely the claim that the excess amount collected was not collected as rent (R. 7; Nos. 2, 3, 4 (R.16)). In other words, it was defendant's sole defense that these amounts, if collected, were collected not as rent but as payments for additional services. However, it is conclusive that since these charges were made "in connection with the use and occupancy of the housing accommodations", the

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[15] The accommodation here is "a small apartment that faces the side street, * * *", and is "a different building" (R. 84). There is no question, therefore, that this is in any way covered by the original registration statement at 430 Daisy Ave. (P. Ex. 9—R. 89). Defendant's claim that the legal rent was "$95.00 per month" (No. 7—R. 17) is completely without support in the record.

amounts collected were rent.[16] (See, *Woods* v. *Dodge,* 170 F. 2d 761 (C. A. 1st)).

It follows, therefore, that since the plaintiff established the maximum rent without contradiction in the record and since the sole testimony in the record, supported by exhibits, is to the effect that more than the maximum rent was paid and since the Court below found that these collections were made, it was error not to enter a judgment for the amount of the overcharge. *Fontes* v. *Porter,* 156 F. 2d 956 (C. A. 9); *Bowles* v. *Glick Bros. Lumber Co.,* 146 F. 2d 566 (C. A. 9); *Woods* v. *Haydell,* 178 F. 2d 914 (C. A. 5); *Bowles* v. *Hastings,* 146 F. 2d 94 (C. A. 5).

2. The plaintiff proved the maximum rents on the property located at 430 Daisy Avenue with the introduction of the order of the Area Rent Director (Plaintiff's Exhibit 4 (R. 44)). The overcharge was established by the admission of the defendant that she collected $75.00 per month (R. 9). It is further established by plaintiff's Exhibit 6 (R. 56) and by the Court's Finding of Fact that $75.00 per month was collected for the period mentioned in plaintiff's Complaint (No. 8, R. 27). Thus, the evidence is substantial that the maximum rent for the premises was $37.50 per month. It was uncontradicted that the defendant collected $75.00 per month for the premises. Consequently, it was error for the Court below to fail to enter

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[16] Section 202(e) of the Act defines rent as:

"The term 'rent' means the consideration, including any bonus, benefit, or gratuity demanded or received for or in connection with the use or occupancy of housing accommodations, or the transfer of a lease of housing accommodations."

a judgment for the plaintiff for at least the amount of the overcharge. *Fontes* v. *Porter, supra.*

CONCLUSION

It is respectfully submitted that the Court below erred in failing to enter a judgment for the plaintiff as prayed in the Complaint and that the judgment should be reversed with directions to the Court below to enter a judgment for the plaintiff as prayed.

Ed Dupree,
General Counsel

Leon J. Libeu,
Assistant General Counsel

Francis X. Riley,
Special Litigation Attorney

Office of the Housing Expediter
Washington 25, D. C.

APPENDIX

Housing and Rent Act of 1947, as amended (50 U. S. C. A., 1881, et seq.):

SEC. 204. (d) The Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and section 202 (c).

RECOVERY OF DAMAGES

SEC. 205. Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment (or shall be liable to the United States as hereinafter provided), for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amounts of (1) $50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or received, whichever in either case may be the greater amount: *Provided,* That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. Suit to recover such amount may be brought in any Federal, State, or Territorial court of competent jurisdiction within one year after the date of such violation: *Provided,*

That if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the United States may institute such action within such one-year period. * * *

SEC. 206. (b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Controlled Housing Rent Regulation (12 F. R. 4331):

"SEC. 825.1. (b) *Decontrolled and exempted housing to which §§ 825.1 to 825.12, inclusive, do not apply*—(1) *Exempted housing.* Sections 825.1 to 825.12, inclusive, do not apply to the following:

(iii) *Accommodations subject to the Rent Regulation for Controlled Rooms in Rooming Houses and other Establishments.* Rooms or other housing

accommodations subject to the provisions of Subpart B."

§ 825.4. *Maximum rents*—(e) *Increase or decrease in space on or after April 1, 1948.* Where housing accommodations are changed on or after April 1, 1948, by a substantial increase or decrease in dwelling space, the maximum rent for the housing accommodations resulting from such change shall be the first rent charged after such change: *Provided, however,* That the Expediter at any time may order a decrease in the maximum rent as provided in §§ 825.5 (c) (1) and (6): *And provided further,* That the rent received for any rental period commencing on or after the date of the first renting shall be received subject to refund to the tenant of any amount in excess of the maximum rent which may later be fixed by an order under § 825.5 (c) (1) or (6) * * *"

"§ 825.5. (c) *Grounds for decrease of maximum rent.* The Expediter at any time, on his own initiative or on application of the tenant, may order a decrease of the maximum rent otherwise allowable only on the grounds that:

(1) *Rent higher than rents generally prevailing.* The maximum rent for housing accommodations established under paragraph (c), (d), (e), (g), or (j) of section 4 of the Rent Regulation for Housing, issued pursuant to the Emergency Price Control Act of 1942, as amended, or under § 825.4 (c) or (e) is higher than the rent generally prevailing in the defense-rental area for comparable

housing accommodations on the maximum rent date. * * *

3 months after the date of filing of such registration statement.

* * *

(6) *Seasonal rent.* The rent on the date determining the maximum rent was substantially higher than at other times of year by reason of seasonal demand or seasonal variations in the rent, for such housing accommodations. In such cases the Expediter's order may if he deems it advisable provide for different maximum rents for different periods of the calendar year.

Rent Proc. Reg. 1 (13 F. R. 2369):

SEC. 840.16. *Stay of landlord's obligation to refund.* (a) Where the Area Rent Director has entered an order under § 840.7, the effect of which is to require a landlord to make a refund to a tenant in accordance with the provisions of section 4 (c), 4 (e), 5 (b), (2), or 5 (c) (1) of the Controlled Housing Rent Regulation, section 5 (b) (2) of the Rent Regulation for Controlled Rooms in Rooming Houses, and Other Establishments, section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation for New York City Defense-Rental Area, section 5 (b) (2) of the Rent Regulation for Controlled Rooms in Rooming Houses and Other Establishments in New York City Defense-Rental Area, section 4 (c), 4 (e), 5

(b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation for Miami Defense-Rental Area, section 5 (b) (2) of the rent regulation for Controlled Rooms in Rooming Houses and Other Establishments in the Miami Defense-Rental Area, or section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation for Atlantic County Defense-Rental Area, the obligation to refund shall be stayed if the landlord within thirty (30) days after the date of issuance of said order, duly files an appeal from said order, together with a refund transmittal memorandum directed to the Regional Budget and Finance Officer on forms prescribed by the Housing Expediter accompanied by a certified check or money order in the amount of the refund payable to the United States Treasurer, and such additional information and documents as may be required. The money so deposited shall be distributed pursuant to the order of the Housing Expediter or in accordance with the final disposition of the proceedings.

Rent Regulation for Transient Hotels, Residential Hotels, Rooming Houses and Motor Courts (8 F. R. 7334):

"SECTION 1. *Scope of this regulation*—(a) *Rooms in hotels and rooming houses and Defense-Rental Area to which this regulation applies.* This regulation applies to all rooms in hotels and rooming houses within each of the defense-rental areas

and each of the portions of a defense-rental area (each of which is referred to hereinafter in this regulation as the 'Defense-Rental Area'), which are listed in Schedule A of this regulation, except as provided in paragraph (b) of this section.

In Schedule A, 'the maximum rent date' and 'the effective date of regulation' is given for each Defense-Rental Area listed. More than one effective date is given for different portions of a Defense-Rental Area where the same effective date is not applicable to the entire Defense-Rental Area. Wherever the words 'the maximum rent date' or the words 'the effective date of regulation' are referred to in this regulation, the dates given in Schedule A for the particular Defense-Rental Area or portion of the Defense-Rental Area in which the room is located shall apply. The effective date listed in Schedule A in each instance is the date rent regulation was effective in the particular Defense-Rental Area or portion of the Defense-Rental Area for rooms in hotels and rooming houses."

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IV. 7-47)

UNITED STATES OF AMERICA
OFFICE OF THE HOUSING EXPEDITER
OFFICE OF RENT CONTROL

ORDER DECREASING MAXIMUM RENT REQUIRING REFUND TO TENANT

STAMP OF ISSUING OFFICE
OFFICE OF HOUSING EXPEDITER
110 East Anaheim
Long Beach 13, California

NCERNING (ADDRESS OF ACCOMMODATIONS)	APARTMENT NO.	DOCKET NO.
.430 Daisy Ave., Long Beach, California		99837-DJA-b

TO: (Name and Address of Landlord)

Dorothy Sharp
428 Daisy Ave.,
Long Beach, Calif.

The Rent Director, after consideration of all the evidence in this matter, has determined that the maximu
nt for the above-described housing accommodations should be decreased on the grounds stated in Section (s
5 C 1 of the Rent Regulation, and further for the reason (s) stated in Se
on(s) 5 C 1 of the Rent Regulation, the maximum rent so decreased an
termined by this Order shall be effective from 6-11-48

Therefore, it is ordered that the maximum rent for the above-described accommodations be, and it hereb
, decreased from $75.00 per Month to $37.50 per Month, effecti
om 6-11-48 No rent in excess of $37.50 Month (maximum rent establishe
this Order) may be received or demanded.

Any rent collected from the effective date of this Order in excess of the amount provided in this Orde
all be refunded to the tenant within 30 days from the date this Order is issued unless the refund is staye
accordance with the provisions of Rent Procedural Regulation No. 1.

This Order is now in effect and will remain in effect until changed by the Office of the Housing Expediter.
DLORD'S LETTER DATED 3/9/49 HAS BEEN CONSIDERED.

SUED MAR 23 1949
(Date)

[signature]
Rent Director.
C. C. [illegible]
RENT DIRECTOR for the
LOS ANGELES DEFENSE RENTAL AREA

NOTICE TO LANDLORD AND TENANT: Read the reve[illegible]

TO: (Name and Address of Tenant)

Mr. Tenant Occupant
430 Daisy Ave.,
Long Beach, California

COMPLIANCE. #2

09 15 03 00124 50

NOTICE TO LANDLORD

This is a final *ORDER* which has been issued by the Rent Director decreasing the Maximum Rent for th
commodations described therein.

THIS ORDER IS IMPORTANT—READ IT CAREFULLY.—As of the date of issuance this Orde
ablishes the Maximum Rent for both *future* and the *past* rental periods. Any rent in excess of the Maximun
nt, as finally fixed by this Order, which you have collected since the *effective date* of the Order, must b
funded to the tenant or tenants from whom it was collected.

The Rent Regulation provides that you must make these refunds to such tenants within 30 days fro
e date this Order is *issued* unless you obtain a stay of refund in accordance with Rent Procedural Regu
ion No. 1. The duty to make such refund is yours and you must make every effort to locate any prio
ants to whom a refund is due.

By taking the following steps you may comply with the Rent Regulation and this Order:

1. Do not collect rent in excess of the Maximum Rent fixed by this Order.
2. Make the required refunds within 30 days after the date this Order is issued, unless you obtain a stay of refund in accordance with Rent Procedural Regulation No. 1, above mentioned.

Failure on your part to make the refunds within the 30-day period above mentioned is a violation of th
nt Regulations and this Order and may subject you to suit for three times the amount refundable or $5
hichever is greater.

NOTICE TO TENANT

This is an Order issued by the Rent Director reducing the rent for the housing accommodations describe
erein. This Order establishes an effective date which is prior to the issuance date. This results in a redu
on of the rent effective retroactively and the Order requires the landlord to refund to every tenant any ren
id by him in excess of the reduced rent for any rental period on and after the effective date of the Orde

The Order ... 1:34 #4 ... tenant entitled thereto within 30 day
... in accordance with Rent Procedu

Case No. 9996-HM Sharp
USA vs.
EXHIBIT #4
Date FEB 24 1950 No. 4 IDENTIFICATION
Date FEB 24 1950 No. 4 IN EVIDENCE
Clerk, U. S. District Court, Sou. Dist. of Calif.
Deputy Clerk

...nt to the landlord for any period afte
...aphs), and compare the rent you pai
...unt of refund due you for each rent

...ng:

...nd has been stayed in accord-

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